No. 23-7108

In the Supreme Court of the United States

EFREN DERMA-DOMINGUEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

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INTRODUCTION

Two decades ago, the Sentencing Commission resolved a circuit split about whether the aggravating role enhancement in guideline § 3B1.1 applied when a defendant did not supervise any participant in the criminal activity. By adopting Application Note 2, it clarified that a defendant must supervise another criminal participant to receive aggravating role. If the defendant merely exercised management responsibility over the criminal organization's assets, the Commission noted that an upward departure—but not the role enhancement—may be warranted. U.S.S.G. § 3B1.1 cmt. n.2. Nearly all circuits apply the guideline and commentary as written. *See* Pet. 15–18.

The Fifth Circuit is an exception. Despite the clear language of Application Note 2, the Fifth Circuit held that the aggravating role enhancement applies even if the defendant, like Derma, did not supervise a participant. *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (en banc). As a result, for over a decade, the district courts in Texas, Mississippi, and Louisiana—where more

than a quarter of all federal sentencings occur[1]—apply the aggravating role enhancement even when the defendant would not receive the enhancement elsewhere because he supervised no participants.

The Government does not defend the Fifth Circuit's interpretation of the aggravating role enhancement. *See* BIO 10–17. Instead, it urges this Court to pass on certiorari because the Fifth Circuit could one day address the issue en banc, the Sentencing Commission could amend the guideline in some future amendment cycle, and Derma's petition is interlocutory because his case was remanded for sentencing on a separate sentencing error. BIO 17–20.

None of these reasons justify declining certiorari. This Court has the jurisdiction to correct the Fifth Circuit's misinterpretation and is in a better position to do so than the Sentencing Commission, because nearly all other circuits adhere to the guidance in Application Note 2. Correcting the Fifth Circuit's misstep would promote uniformity in sentencing and permit defendants like Derma to seek reductions such as safety valve or for being a zero-

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[1] U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2023, Fifth Circuit*, Table 8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/5c23.pdf.

point offender, U.S.S.G. §§ 2D1.1(b)(18), 4C1.1, that are otherwise barred by an aggravating role enhancement.

ARGUMENTS AND AUTHORITIES

I. This Court is better situated than the Sentencing Commission to address the Fifth Circuit's mistaken approach to the aggravating role enhancement.

The Government invokes *Braxton v. United States*, 500 U.S. 344, 347–48 (1991), to argue that the Court should not grant certiorari because Congress charged the Sentencing Commission with reviewing such issues. BIO 12–13. But this situation is unique. The Commission already addressed—and resolved—a circuit split regarding the application of the aggravating role enhancement. U.S.S.G. App. C, amend. 500. And nearly all circuit courts adhere to the Commission's clear guidance that the aggravating role enhancement applies only if the defendant supervised a participant, but an upward departure (and not the role enhancement) *may* be warranted if the defendant only "exercised management responsibility" over the criminal organization's property or activities. § 3B1.1 cmt. 2; *see* Pet. App. 15–16 (collecting cases).

As the Government notes, BIO 13, the Sentencing Commission is aware of the Fifth Circuit's anomalous approach to the aggravating role enhancement, but it has not addressed it in the decade since *Delgado*. This is unsurprising, given that the Commission "does nothing about most of the conflicts that it admits exists." Dawinder S. Sidhu, *Sentencing Guidelines Abstention*, 60 Am.

Crim. L. Rev. 405, 436 (2023) (citing Commission data and examples).

This case is not like *Braxton*, where the Commission was already considering an amendment to the guideline in question. 500 U.S. at 348. While the Commission has prioritized resolving circuit conflicts in general, nothing suggests it will address this conflict about aggravating role soon. *See* U.S. Sentencing Comm'n, *Final Priorities for Amendment Cycle*, 89 FR 66,176, 60,176–77 (Aug. 14, 2024). Because the Commission's commentary language is already clear, it is not obvious how the Commission—as opposed to this Court—could correct the Fifth Circuit's misinterpretation. These circumstances make it even more unlikely that the Commission will amend a guideline that other courts of appeals interpret correctly.

II. The Fifth Circuit's misinterpretation of the aggravating role enhancement has serious practical effects.

Despite the Government's argument to the contrary, BIO 16, the difference between an aggravating role enhancement and an upward variance directly impacts defendants in significant ways.

First, despite being advisory, most defendants are sentenced within the Guidelines range, with less than 1% receiving an upward departure. U.S. Sentencing Comm'n, *Statistical Information Packet, supra* n.1, at Table 8. This is especially true in the Fifth

Circuit, where two-thirds of defendants receive sentences within the Guidelines range. *Id.* Thus, including the aggravating role enhancement likely increased the ultimate sentence Derma received, and it is far from obvious that Derma or defendants like him would have instead received a comparable upward departure. As this Court recognizes, the "Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Because the "Guidelines inform and instruct the district court's determination of an appropriate sentence," in the typical case, the "selected Guidelines range will affect the sentence." *Id.*

Second, an aggravating role enhancement has practical effects that an upward variance does not, such as disqualifying a defendant from certain Guidelines reductions. For example, an aggravating role enhancement disqualifies a defendant from receiving a two-level reduction for "safety valve" and a sentence below the mandatory minimum. 18 U.S.C. § 3553(f)(4); U.S.S.G. §§ 2D1.1(b)(18), 5C1.2(a)(4). The aggravating role enhancement also bars a defendant from receiving the recently added two-level reduction for certain defendants with zero criminal history points. U.S.S.G. § 4C1.1(a)(10).

Derma's case demonstrates the many ways a defendant can be prejudiced by the misapplication of the aggravating role enhancement. He received an additional two levels because of the role enhancement, which anchored his sentence to an increased Guidelines range. Pet. App. A3. The enhancement also disqualified him from safety valve.[2] *See* §§ 2D1.1(b)(18), 5C1.2(a)(4). And because of the aggravating role enhancement, Derma is not eligible for the recently implemented "zero-point offender" two-level offense reduction.[3] *See* § 4C1.1(a)(10). Had he received only an upward variance, he could have been eligible for both safety valve and the zero-point reduction.

Third, by permitting an aggravating role enhancement for exercising asset management responsibilities, the Fifth Circuit muddies the waters between aggravating role and mitigating role. *See* Pet. 19. As Judge Dennis aptly critiqued, applying the aggravating role enhancement to Derma, who "only transported marijuana at

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[2] The prosecutor agreed Derma provided truthful information, another requirement for safety valve. C.A. ROA.109. The district court did not consider Derma's eligibility because of the aggravating-role bar. C.A. ROA.109–10. Derma argued on appeal that safety valve should be reconsidered if the aggravating role enhancement was deemed erroneous. *See* Pet. App. A4.

[3] Guideline § 4C1.1 was not in effect at Derma's original sentencing. But the Sentencing Commission made that amendment retroactive. *See* U.S.S.G. App. C, amend. 821, 825; U.S.S.G. § 1B1.10(d).

the order of others," Pet. App. A16, comes dangerously close to concluding that every drug runner is a manager, Pet. App. A18. Such a conclusion is out of sync with the commentary to the mitigating role guideline, which specifically recognizes that someone who transports drugs can still be considered for a mitigating role reduction. *See* U.S.S.G. § 3B1.2 cmt. n.3(A).

III. The Government's procedural complaints do not warrant passing on review.

The Government raises various concerns about Derma's preservation and presentation of the issue for review, BIO 17–20, but none defeat the reasons presented for granting certiorari.

First, the Government's preservation complaint—that Derma did not specifically argue to the district court that the binding precedent interpreting the commentary was incorrect—is a red herring. BIO 17–18. A more specific objection at the trial level would not have made a better record for review. Derma's objection to the aggravating role enhancement brought the issue to the district court's attention and alerted the Government to its burden to present evidence supporting the enhancement. *See* ROA.93, 163. Additional argument would not have affected the outcome because the district court was bound by the Fifth Circuit precedent. *See Delgado*, 672 F.3d at 345. Only the Fifth Circuit en banc or this Court can correct the erroneous interpretation.

The Government suggests that an objection to the Fifth Circuit's interpretation would have prompted the Government to introduce evidence that Derma supervised participants. BIO 17–18. This is doubtful because the Government already had every incentive to present evidence at sentencing that Derma supervised others, as such evidence would have clearly supported the enhancement. *See* § 3B1.1 & cmt. n.2. Instead, the Government's witness testified that Derma worked for others and did not recruit the other driver. C.A. ROA.97, 103. Derma consistently argued that he supervised no participant. C.A. ROA.149–50; Derma C.A. Br. 11, 16; Derma C.A. Reply Br. 1, 3; C.A. Oral Arg. 1:45–1:53. Yet the Government did not argue below or on appeal that Derma supervised any participant. Failing to contest this material assertion is an implicit concession that Derma did not supervise any participants. *Cf. Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1250 (2024) (failing to present an alternative map in a redistricting case "should be interpreted by district courts as an implicit concession that the plaintiff cannot draw [such] a map").

Second, Derma's request for certiorari is not "premature." BIO 15. Derma is not required to petition for rehearing en banc before seeking certiorari. *See* Sup. Ct. R. 13(3); 5th Cir. R. 40 I.O.P. Had he sought rehearing en banc, it is not clear the court of appeals

would have reheard his case. "Fewer than 1% of the cases decided by the [Fifth Circuit] on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parities." 5th Cir. R. 35 I.O.P.

While several Fifth Circuit judges have disagreed with *Delgado*, BIO 14–15, the Fifth Circuit has never granted review of the issue *sua sponte*, and many panels note the issue but voice no need for revisiting the issue en banc. *See, e.g.*, *United States v. Aderinoye*, 33 F.4th 751, 756 (5th Cir. 2022) (noting inconsistency between Application Note 2 and precedent, but remaining silent on whether en banc review is warranted); *United States v. Polty*, 798 F. App'x 824, 825 n.1 (5th Cir. 2020) (per curiam) (same). Other panels simply affirm aggravating role without acknowledging that *Delgado* conflicts with Application Note 2 and other courts of appeals. *See, e.g.*, *United States v. St. Junius*, 739 F.3d 193, 208 (5th Cir. 2013); *United States v. Abreu*, No. 21-60861, 2023 WL 234766, at *2–3 (5th Cir. Jan. 18, 2023). Because the Fifth Circuit's interpretation conflicts with the interpretation by other courts of appeals, this Court should resolve the question.

Third, the Court can and should hear this petition even if it is interlocutory. *Contra* BIO 19. The Court has "unquestioned

jurisdiction" to review interlocutory judgments, and none of the concerns regarding the grant of an interlocutory petition apply here. Stephen M. Shapiro et al., *Supreme Court Practice* 4-54–55 & n.72 (11th ed. 2019). Derma's conviction is already assured, and the court of appeals remanded on a separate sentencing error that does not affect the aggravating role inquiry. Pet. App. A11–12. No issues were raised in those remanded proceedings that need to be consolidated into a petition.

Here, Derma "raises a clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Shapiro, *Supreme Court Practice*, *supra* at 4-55. Additionally, the Fifth Circuit's interpretation of the guideline commentary "is patently incorrect," and this Court's intervention will "finally resolve the litigation." *Id.* at 4-55, 4-57. By granting certiorari and correcting the Fifth Circuit's outlier approach to aggravating role, the Court will foster uniformity in federal sentencing. *Cf. Bates v. United States*, 522 U.S. 23, 29 (1997) (addressing circuit conflict by granting interlocutory petition for certiorari). And it will do so timely—a key concern given that Derma's anticipated release from prison is in August 2027.[4] These

[4] Bureau of Prisons, Find an inmate, https://www.bop.gov/inmateloc/ (last visited Sept. 21, 2024).

circumstances all support granting certiorari so the case can be remanded for further proceedings and ultimate resentencing.

Lastly, the case is not moot. *Contra* BIO 20. Derma still has an injury from the court of appeals' erroneous aggravating role decision—the length of his incarceration. That issue was kept alive by this petition for certiorari. "The Supreme Court does not lose jurisdiction because the mandate of the court of appeals has issued." *United States v. Perez*, 110 F.3d 265, 266–67 (5th Cir. 1997) (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n. 2 (1983)). Nor does Derma's "obedience to the mandate of the Court of Appeals and the judgment of the District Court … moot this case." *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972).

Appealing from the sentence imposed on remand to again challenge the Fifth Circuit's precedent on aggravating role was unnecessary when this petition already raises that issue. Should Derma prevail in this Court, the case can be remanded to the court of appeals and then to the district court for resentencing. *See United States v. Sears*, 411 F.3d 1240, 1242 (11th Cir. 2005) (reinstating prior opinion after remand from the Supreme Court—despite intervening remand and resentencing while certiorari was pending—and recognizing that the defendant could then appeal from the district court's resentence order on remand). At minimum, with

the Court's ruling on aggravating role, Derma could seek a sentence reduction under retroactive guideline § 4C1.1.

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Kristin M. Kimmelman
KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Counsel of Record for Petitioner

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